No. 03-18

Supreme Court, U.S.
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In the Supreme Court of the United States

ADRIAN D. HORIEN,

Petitioner,

v.

CITY OF ROCKFORD,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, Second District

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

The City's brief in opposition is most notable for what it does not say. Respondent does not deny that its "nuisance noises" ordinance, which makes it a crime to "annoy" someone with "unusual" or "unnecessary" noise, embodies a "completely subjective standard of 'annoyance.'" *Grayned* v. *City of Rockford*, 408 U.S. 104, 113 (1972). It does not disagree with our showing (Pet. 11-15 & nn. 3-4) that, since *Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971), scores of state and federal courts – including state supreme courts in Alaska, Colorado, Georgia, Kansas, Mississippi, New York and Rhode Island – have invalidated on vagueness and/or overbreadth grounds local ordinances that punish "annoying" noise or conduct (including ordinances *identical* to Rockford's). Nor does the City deny that the lower court's suggestion that Rockford's ordinance is limited to "common-law nuisance[s]" (Pet. App. 5a) only compounds the fatal ambiguity in the criminal proscription. See Pet. 15-16. And the City does not dispute that there is confusion in the lower courts over whether ordinances such as Rockford's are content-based – and violate the First Amendment when, as here, they are applied to punish criminally the use of an unamplified human voice by someone engaged in protected expression in a quintessential public forum. See Pet. 20-30.

The City's perfunctory submission appears largely aimed at staving off summary reversal. But all of the City's arguments are either meritless or confirm why summary reversal (or, failing that, a grant of plenary review) is warranted in this case.

1. Coates *Is Controlling And Warrants Summary Reversal.* The City maintains (Opp. 2) that *Coates* is not "binding on this case" because the Rockford ordinance is "more comparable" to the sound-truck ordinance upheld in *Kovacs* v. *Cooper*, 336 U.S. 77 (1949). That argument is flawed at every turn.

a. *Coates* involved a Cincinnati ordinance which made it unlawful "'for three or more persons to assemble, except at a public meeting of citizens, on any of the sidewalks, street corners, vacant lots, or mouths of alleys, and there conduct themselves in a manner *annoying* to persons passing by, or occupants of adjacent buildings.'" 402 U.S. at 611 n.1 (quoting law) (em-

phasis added). In *Coates*, this ordinance had been used to punish "a student involved in a demonstration" (presumably, against the Vietnam War) as well as "pickets involved in a labor dispute." *Id.* at 612. In similar language, Rockford's "nuisance noises" ordinance makes it unlawful "to cause or create any unnecessary or unusual noise at any time which *annoys*, injures, or endangers the comfort, repose, health or safety of others unless such noise is necessary for the protection or preservation of property or of the health, safety, or life of some person." Pet. App. 14a (emphasis added).

In *Coates*, this Court invalidated the Cincinnati law on both First Amendment and due process grounds because it imposed criminal penalties for conduct that was "annoying" to others. "The First * * * Amendment[]," the Court explained, "do[es] not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be 'annoying' to some people." 402 U.S. at 615. "If this were not the rule," the Court reasoned, "the right of the people to gather in public places for social or political purposes would be continually subject to summary suspension through the good-faith enforcement of a prohibition against annoying conduct." *Ibid.* "And such a prohibition, in addition, contains an obvious invitation to discriminatory enforcement." *Id.* at 616. A criminal proscription against "annoying" conduct is also void for vagueness under the Due Process Clause, the Court held, because it embodies an "unascertainable standard": "[c]onduct that annoys some people does not annoy others." *Id.* at 614; see also *ibid.* (violations of Cincinnati ordinance "may entirely depend upon whether or not a policeman is annoyed").

The Rockford ordinance suffers from exactly the same constitutional defects. At bottom, it too criminalizes conduct because the conduct is somehow "annoying" to others. True, there are several differences between the Cincinnati and Rockford ordinances, but those differences do nothing to cure the vagueness or overbreadth problems that flow from the use of a subjective "annoyance" standard. Respondent emphasizes that the Cincinnati law criminalized annoying "conduct"

(including expressive conduct) whereas the Rockford ordinance criminalizes annoying "noise." Opp. 2. But as explained in the petition (at 12), because noise encompasses *speech* (including, as in petitioner's case, core political speech), this difference only makes the Rockford ordinance *more* problematic. In addition, the Rockford ordinance punishes a broader range of expression since it proscribes, in the alternative, speech and other "noise" that "injures" or "endangers" the "comfort" or "repose" of others. But that additional vague prohibition only compounds the Due Process problem: What does it mean to "endanger" the "repose" of another? That standard is so expansive that it could cover the chime of a doorbell rung by Girl Scouts selling unwanted cookies and virtually any type of telemarketing. See also *Cox* v. *Louisiana*, 379 U.S. 536, 551 (1965) (invalidating "breach of the peace" ordinance that made it unlawful to "arouse" another person "from a state of repose").

The Rockford ordinance also differs from Cincinnati's in that it is limited to noise that is either "unnecessary or unusual." But what does *that* mean? And what does it add? Virtually *any* noise that is annoying will also be perceived by the hearer as "unnecessary." Indeed, as we pointed out in the petition (at 13 & n.4), several courts (including the Fourth Circuit) have held that a proscription against "unnecessary" noise creates a vagueness problem of its own. In any event, the lower court clarified that "[a]n 'unnecessary' or 'unusual' noise is one that *is not required to alert others of an emergency*" (Pet. App. 5a (emphasis added)). That limiting construction effectively drains the phrase "unnecessary or unusual" of all limiting effect and independent meaning (given the separate exception for noise that is "necessary for the protection or preservation of property, or the health, safety, or life of some person"). None of these differences in the wording of the Rockford ordinance serves to clarify the meaning of "annoying."[1]

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[1] In other ways as well, the Rockford ordinance sweeps more broadly than the Cincinnati ordinance struck down in *Coates* (and thus risks greater chilling effects). The Rockford law prohibits the annoyance of *anyone* in the City, whereas the Cincinnati ordinance applied only "to persons passing by" the

b. Equally incorrect is the City's suggestion that its ordinance more closely resembles the sound-truck ordinance upheld in *Kovacs* by a 5-4 vote, which made it unlawful

> to play, use or operate * * * on or upon the public streets, alleys and or thoroughfares * * *, any device known as a soundtruck, loud speaker or sound amplifier, or any other instrument * * * which emits therefrom *loud and raucous* noises and is attached to and upon any vehicle operated or standing upon said streets or public places * * * .

See *Kovacs*, 336 U.S. at 78 (quoting law) (emphasis added). In upholding the Trenton ordinance, the plurality noted that it applied only to (a) vehicles, (b) that were being operated on the public streets, and (c) that contained sound amplifiers or other instruments that "emit[] loud and raucous noises." 336 U.S. at 83. "Sound trucks," the plurality explained, still "may be utilized in places such as parks or other open spaces off the streets," where they do not create the same risk of "distractions" that are "dangerous to traffic." *Id.* at 85, 87.

In contrast to the Rockford and Cincinnati ordinances, the Trenton ordinance did not impose criminal punishment for "annoying" other people. On that basis alone, the Trenton ordinance is distinguishable. Beyond that, the Trenton ordinance is different because it narrowly targeted the use of *sound trucks and other mechanical sound amplification devices* in limited circumstances. Respondent attempts to draw a parallel between the conjunctive phrase "loud *and* raucous" (which the Court in *Kovacs* said was not unconstitutionally vague when used to describe prohibited noises made by a sound truck or other ampli-

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offenders and to "occupants of adjacent buildings." The Rockford ordinance applies *anywhere* in the City, whereas the Cincinnati law covered only the "sidewalks, street corners, vacant lots, [and] mouths of alleys." And the Rockford ordinance applies to the "annoying" speech of even a single protester, whereas the Cincinnati law was limited to situations where "three or more persons" were engaged in "annoying" conduct. Although the First Amendment right at issue in *Coates* was principally the rights to free assembly and association and this case involves the right of free speech, that difference is immaterial (and respondent does not contend otherwise).

fier) and the Rockford ordinance's disjunctive reference to "unnecessary *or* unusual" noise. The argument fails for at least three reasons. First, as just noted, the lower court construed "unnecessary or unusual" as meaning "not required to alert others of an emergency" (Pet. App. 5a). So construed, the phrase bears no resemblance to "loud and raucous." Second, even as a matter of ordinary meaning, the two phrases are obviously different; the definiteness of one sheds no light on the definiteness of the other.[2] Third, "loud and raucous" draws special meaning from its context in an ordinance targeting sound trucks and other mechanical sound amplification devices in moving vehicles; "unnecessary or unusual," in contrast, potentially applies to *any* noise made at *any* time in the City of Rockford. See note 1, *supra*.[3]

c. As we showed in the petition (at 11-15), many state and federal courts have followed *Coates* in invalidating on vagueness or overbreadth grounds local ordinances that impose criminal penalties for "annoying" others. This Court has not hesitated to order summary reversal of decisions that ignore *Coates*. Pet. 17 n.6. Notably, some of the lower-court decisions that have invalidated ordinances on the strength of *Coates* have involved laws that were *identical* to the Rockford law at issue here. See *id.* at 12-13. If respondent is correct about *Kovacs*'s meaning, then this uniform body of decisions is wrong – and there is all the more reason why plenary review is warranted in this case. In fact, however, there is good reason why courts

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[2] Contrary to the City's suggestion, "unnecessary or unusual" does not necessarily mean loud – either as a matter of ordinary meaning or under the limiting construction of that phrase adopted by the lower court. Cf. Opp. 2-3 (suggesting that the ordinance "address[es] the volume of the noise"). Rockford knows how to proscribe loud noises – and to do so through precise decibel limitations – and has done so in other provisions of its noise ordinances. See Pet. App. 11a-12a.

[3] Respondent's effort to draw support from *Kovacs* suffers from another flaw: the *Kovacs* majority expressly *distinguished* between laws that restrict the use of sound amplification devices and laws that place restrictions on the unamplified human voice. See Pet. 26.

rarely bother to distinguish *Kovacs* (and this Court saw no reason to do so in *Coates*): *Kovacs* is facially inapplicable.[4]

d. In response to our request for summary reversal on overbreadth grounds, the City falls back on generalities about how that doctrine is "strong medicine" and "rarely" used. Opp. 6. But it never explains why this issue is not squarely controlled by *Coates*. The City suggests that its ordinance is not overbroad because "any person creating nuisance noise" is "encompassed" within its "legitimate sweep." *Ibid.* But the same argument was rejected in *Coates*. See 402 U.S. at 614.

2. *The Lower Court's Misplaced Reliance On Old Illinois Decisions*. As we explained (Pet. 6-7, 15-17), the lower court's reliance on two fifty-year-old Illinois Supreme Court cases was erroneous. In addition to being obviously distinguishable, those cases predate, and have been superseded by, this Court's modern vagueness and overbreadth decisions (including *Coates*). Pet. 9-11, 15-16. And given the indeterminacy of the concept of "nuisance," the lower court's suggestion that the Rockford offense covers only "common-law nuisances" does nothing to ameliorate the vagueness problem.

None of this is disputed by respondent. Taking a page from the lower court's opinion, the City merely asserts that the Illinois courts correctly rejected petitioner's vagueness challenge because "the word 'annoying' had a well-established meaning in the context of common-law nuisance." Opp. 3. If this meaning of "annoying" was so well established, one can only wonder why it was unmentioned in *Coates* and in the scores of lower-court decisions that have followed *Coates*. See also *Saia* v. *New York*, 334 U.S. 558, 560 (1948) (invalidating penal ordinance forbidding use of sound amplification devices

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[4] Notably, the City has abandoned its principal argument below against petitioner's vagueness challenge: that it should be rejected under this Court's decision in *Grayned*. See Resp. C.A. Br. 16-19; Rockford Br. in Opp. to Defendant's Motion, at 4-6. With good reason: As we explained in the petition (at 3 & n.1, 26-27), *Grayned* confirms the invalidity of the Rockford ordinance. See also Brief of Consistent Life *et al.* as *Amici Curiae*, at 3-4.

that produce "sounds" that cause "annoyance" even though ordinance was "dressed in the garb of the control of a 'nuisance'"). Notably, the City makes no effort to explain what this "well-established" meaning is, or why it narrows the criminal proscription in any meaningful way (and neither did the appellate court). Perhaps this is not surprising: the City, after all, never so much as hinted in the lower courts that the word "annoying" had a "well-established meaning" under Illinois common law.[5] Nor was there any hint in Officer McDonald's testimony that he (or anyone else at the Rockford Police Department) limits enforcement of the ordinance to "common-law nuisances." The City cannot even bring itself to assure *this Court* that it will limit enforcement *in the future* to "common-law nuisances."

3. *Content-Neutrality*. In support of our alternative request for plenary review, we showed (Pet. 20-25) that the Rockford ordinance is content-based because it (a) singles out speech (and other noise) based on its effect on the hearer (annoyance), (b) contains a content-based exception for speech "necessary for the protection or preservation of property, or the health, safety, or life of some *person*" (which the lower courts ruled does not protect petitioner because he was attempting to protect unborn children), and (c) criminalizes certain features of verbal expression (here, petitioner's use of a falsetto) that are inextricably connected to a speaker's actual message. We further showed (Pet. 23-24) that the lower courts disagree over whether ordinances proscribing "annoying" noises are content based.

The City has almost nothing to say in response to these arguments. On the merits, it suggests in passing (Opp. 4) that

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[5] On the contrary, the City contended that the ordinance – including the word "annoys" – should be interpreted according to its "ordinary meaning" as reflected in "ordinary dictionary definitions." Resp. C.A. Br. 16-17; see also *id.* at 16 ("'Annoys' means ['disturbs or irritates, especially by repeated acts.'"). In rejecting petitioner's vagueness challenge, the Illinois Appellate Court stated: "[W]e hold that the *plain language* of the noise ordinance gives fair notice to the public and to the City that noise creating a nuisance is prohibited." Pet. App. 5a (emphasis added). Thus, it is far from clear that the lower court actually relied on the "common law" meaning of "annoys."

the Rockford ordinance is not content-based because it applies to noise other than speech, but that is no answer. A content-based restriction on speech does not cease to be so merely because it is included in a law that *also* regulates non-speech conduct or noise. The City also asserts, without explanation, that the Rockford ordinance must be treated as content neutral under this Court's decision in *Hill* v. *Colorado*, 530 U.S. 703 (2000). But the law in *Hill* did not have the three attributes mentioned above that render the Rockford ordinance content-based. *Hill* is thus not controlling here.

4. *Time, Place Or Manner Restriction.* As a further reason why plenary review is warranted, we showed (Pet. 25-28) that the Rockford ordinance flunks intermediate scrutiny because it is neither narrowly tailored nor leaves open ample alternative means of communication. In response, the City argues primarily that it has a significant interest in regulating noise. Opp. 5-6. We do not dispute that. The City offers no defense of its ordinance as narrowly tailored – an extraordinary dereliction, given the issues raised in the petition. See Pet. 25-27.

The City does suggest that the ordinance leaves open ample alternative means of communication because Horien could have spoken his message in a conversational tone. Opp. 5-6. That argument ignores the undisputed fact that if petitioner had done so, he would never have been heard by his intended audience – patients some distance away who were entering the clinic from an adjacent parking lot and were disappearing behind a privacy fence – over the din of the counternoise broadcast by the building's owner to drown out the protesters. The City's argument also underscores the difference between this case and *Hill*, where the statute was drafted to ensure that communication in a conversational tone reached the intended audience. See 530 U.S. at 726-27. And there is no support for the proposition (Opp. 6) that the City may prohibit all effective oral speech so long as it permits other methods of communication such as leafleting. See Pet. 27-28. It is not for the City to decide for protesters how they should express themselves.

On the merits, the City also contends that its ordinance withstands constitutional challenge because it protects the rights of "unwilling listeners" and is "designed to ensure that its citizens are not disturbed in their homes and places of business." Opp. 3, 5. The Rockford ordinance, however, does not target listeners in homes or places of business (much less patients in abortion or medical clinics) – and neither is it limited to unwilling listeners. Compare *Hill*, 530 U.S. at 707-08, 715, 718 & n.25 (noting that statute targeted the act of "approaching unwilling listeners" near the entrance to abortion clinics and other medical facilities). The Rockford ordinance covers anyone in Rockford who might be annoyed by noise – whether or not they are willing listeners.[6]

Nor is the City correct in suggesting (Opp. 3 & n.1) that the right to be left alone in one's *home* is implicated by this case. The lower court dismissed as "inherent[ly] implausibl[e]" (Pet. App. 8a; see Pet. 19) the testimony of the complaining witness, Robert Stone, that he had been "annoyed" inside of his home – a full block away, with windows shut, and over the din of floor drum sanders. The Illinois Appellate Court upheld petitioner's conviction for "annoying" *someone else*: Wayne Webster, the owner of the commercial building in which the clinic was located, who also happened to be the person responsible for broadcasting noise at the protesters *to prevent them* from

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[6] If the City is suggesting that *Hill* tacitly overrules *Coates*, *Grayned*, and other decisions of this Court (see Pet. 9-11), the City is simply wrong. In addition, as the Court is no doubt aware, *Hill* has been "condemned by progressive and conservative legal scholars alike[.]" Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 31 & n.3 (2003). *E.g.*, Symposium, *The Supreme Court's Most Extraordinary Term*, 28 PEPP. L. REV. 747, 750 (2001) (*Hill* "was slam-dunk simple and slam-dunk wrong") (comments of Laurence H. Tribe); *id.* at 747 (*Hill* "is inexplicable on standard free-speech grounds") (comments of Michael W. McConnell); Kathleen M. Sullivan, *Sex, Money, and Groups: Free Speech and Association Decisions in the October 1999 Term*, 28 PEPP. L. REV. 723, 737 (2001) (same). For the reasons ably set forth by these prominent scholars, we believe the Court would be very reluctant to extend *Hill* in the manner implicitly urged by respondent.

communicating with his tenants and the clinic's patients. See Pet. 4-5, 19-20.[7] There was *no* evidence – none – that any patient of the clinic was "annoyed" by petitioner's voice or that the operation of the clinic was in any way disrupted.

5. In *Coates*, this Court warned that laws such as Cincinnati's (and Rockford's) "contain[] an obvious invitation to discriminatory enforcement against those whose [conduct] * * * is 'annoying' because their ideas, their lifestyle, or their physical appearance is resented by the majority." 402 U.S. at 616. Whether the complaining party is a segregationist who is "annoyed" by the demands of black citizens marching for racial equality, a neighbor willing to concoct a wild story and call out the police on a protester with whom he disagrees, or even a building owner whose livelihood is negatively affected by protests that cause him expense and "annoyance" (and who attempts to drown out the protesters and prevent them from communicating with others), the risk to free expression is exactly the same. For precisely that reason, a large number of protest groups and civil libertarians from across the political spectrum have joined in an *amicus* brief underscoring the threat such laws present to political freedom and urging this Court not to permit the decision below to stand.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision summarily reversed; in the alternative, the petition should be granted and the case set for briefing and argument.

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[7] The City states (Opp. 3 n.1) that Webster "lives" in the commercial building where the clinic is located, but it neglects to mention that Webster clearly testified he "was in [his] security office" at the time he purportedly suffered "annoyance" as a result of petitioner's protests. 12/12/01 Tr. 25; see also *id.* at 44-46. Webster testified that he had also heard petitioner that day while in the apartment (which was located much further away from the protests), but only because the external PA system Webster used to drown out the protesters also included a microphone system that piped the sound of petitioner's voice into the apartment. See *id.* at 39-40. And, of course, it is undisputed that the clinic was located in an area zoned for commercial use.

Respectfully submitted,

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